Supreme Court, U.S.
FILED
SEP 12 2001
CLERK

(2)

No. 01-128

In The

Supreme Court of the United States

STATE OF CALIFORNIA, *et al.*,

Petitioners,

v.

GEORGE E. SCHULMAN, CHAPTER 7 TRUSTEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* STATES OF MONTANA, DELAWARE, HAWAII, MARYLAND, OHIO, TEXAS, UTAH, WEST VIRGINIA, COMMONWEALTH OF PUERTO RICO, TERRITORY OF GUAM IN SUPPORT OF PETITIONERS

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REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION THREATENS THE STATES' ABILITY TO IMPOSE AND COLLECT TAXES.

The Ninth Circuit's decision to recognize California's action in filing a claim in the bankruptcy proceeding as an implied waiver of its sovereign immunity directly threatens the States' ability to collect and retain funds, including taxes and other debt. California, in this case, and any State for that matter, has no control over a debtor's choice of forum. Thus, the Ninth Circuit's decision potentially could be applied to any State that files a claim in bankruptcy court, not just those States physically situated within the boundaries of the Ninth Circuit.

The Ninth Circuit reads *Gardner v. New Jersey*, 329 U.S. 565 (1947), as working a blanket waiver of a state's sovereign immunity whenever a state files a proof of claim in bankruptcy. Pet's App. at 18-21. As a result, the Ninth Circuit focuses on the extent of California's waiver and its application to the "same transaction or occurrence" test. *Id.* The court misapplies the "logical relationship" test of Rule 13(a) of the Federal Rules of Civil Procedure, in finding that a proof of claim filed by the California Board of Equalization to collect unpaid taxes and underground-storage-tank fees logically relates to the debtor's claims for reimbursements from the underground-storage-tank fund for corrective actions taken on its underground storage tanks. Pet's App. at 23-25.

In doing so, the Ninth Circuit minimizes the "indignity" of subjecting a state to suit in federal court. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). State revenue

departments routinely file proofs of claim in bankruptcy to collect unpaid taxes. As this Court has noted, "[t]he power to tax 'is an incident of sovereignty. . . . ' " *International Harvester Co. v. Wisconsin Dept. of Taxation*, 322 U.S. 435, 444 (1944), *quoting McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 429 (1819). Restrictions imposed by the Ninth Circuit in this case on California's ability to impose and collect taxes, in the form of an overly liberal reading of the "same transaction or occurrence test," Pet's App. at 24, impugns California's sovereignty, and, in turn, the sovereignty of all States.

Indeed, the Ninth Circuit's decision actually rewards a tax scofflaw by granting it the ability to hale a state agency into federal court simply because the State has a proof of claim to recover unrelated state taxes from the bankruptcy estate. *See also In re Hughes-Bechtol, Inc.*, 124 B.R. 1007, 1018 (Bankr. S.D. Ohio 1991) (holding that state revenue department's filing of a proof of claim in bankruptcy permitted the debtor to proceed with counterclaim for breach of contract). This overly expansive view of the "same transaction or occurrence" test runs afoul of the notion that a State cannot waive its Eleventh Amendment immunity by implication. Such waiver must be "stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (*quoting Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)). *See also College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) (citing *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944)). No such "overwhelming" showing of consent has

been made here. To the contrary, California vigorously resisted jurisdiction at every stage of the proceedings.

Moreover, as explained in *Seminole Tribe* and its progeny, neither the comprehensiveness of a federal power nor the desire for uniformity in a scheme of federal law, such as the "logical relationship" test of Rule 13(a) of the Federal Rules of Civil Procedure, overcomes the States' sovereign immunity. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 647-48 (1999). In view of this precedent, "there is simply no principled basis to distinguish the Bankruptcy Clause from other Article I clauses" such as the Commerce or Patent clauses. *In re Sacred Heart Hosp. of Norristown*, 133 F.3d 237, 243 (3d Cir. 1998).

Further, what constitutes "logical" for purposes of Rule 13(a) of the Federal Rules of Civil Procedure and its concern for judicial economy, may not represent the same logic that determines whether a claim represents a permissible action for recoupment for purposes of sovereign immunity. *See Oklahoma Tax Commission v. Potawatomi Tribe*, 498 U.S. 505, 509 (1991) (holding that tribe's request for declaratory judgment did not constitute waiver of sovereign immunity for compulsory counterclaim under Rule 13(a)). Rule 13(a) of the Federal Rules of Civil Procedure makes no mention of any intent by Congress to abrogate the States' sovereign immunity as a matter of course.

II. THIS COURT'S EARLY DECISIONS RECOGNIZED THE BROAD SCOPE OF THE STATES' ELEVENTH AMENDMENT IMMUNITY.

The Court, in *Alden v. Maine*, 527 U.S. 706 (1999), provides a comprehensive picture of the founders' intent and understanding of State sovereign immunity at the time of the debates and ratification of the Constitution. 527 U.S. at 716-24. "The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity." 527 U.S. at 715. The founders' writings and speeches demonstrate the general understanding of the time that States would continue to enjoy immunity from suit. 527 U.S. at 716-24.

Advocates of the Constitution repeatedly assured the people "in no uncertain terms that the Constitution would not strip the States of sovereign immunity." 527 U.S. 716. For example, in *The Federalist No. 81*, Alexander Hamilton carefully distinguished "an alienation of State sovereignty," which he had discussed in *The Federalist No. 32*, from State sovereign immunity. He argues that "there is no color to pretend that the State governments would, by the adoption [of the Constitution], be divested of the privilege [of sovereign immunity]. . . . " *The Federalist No. 81*, at 487-88 (Alexander Hamilton) (Clinton Rossiter, ed. 1961); 527 U.S. at 717. Hamilton clearly sought to quell the fear that sovereign immunity would be sacrificed if the constitution were ratified, and so distinguished the alienation of state sovereignty inherent in conceding certain aspects of law-making *authority* to Congress from the

ceding of sovereign *immunity* to suit in federal courts by private individuals to enforce those laws.[1]

Other supporters at the various state ratifying conventions also assured the States that they could not be sued in federal court. Both James Madison and John Marshall spoke at the Virginia ratifying convention, supporting the understanding that a State would not be sued without its consent. 527 U.S. 717-18; Jonathon Elliot, *Debates on the Federal Constitution* 533, 555 (2d ed. 1854). The New York and Rhode Island conventions expressly proclaimed that their understanding of the Constitution did not include the ability of private persons to sue the State. 527 U.S. 718-19; Elliot, *Debates* at 336, 329.

And when, just five years after the Constitution had been ratified, the Court in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), held that a private citizen of another

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[1] As Hamilton made clear in *The Federalist No. 32*, the degree of alienation of sovereignty could vary widely. In some instances, such as naturalization of foreign citizens the federal government would wholly occupy the field; in others, such as taxation, both a federal and state scheme could exist. Bankruptcy is a field where for at least half of the nation's history, there was no federal insolvency law at all, and states were the only active regulators of the field. With or without a federal law, states remain able to regulate treatment of insolvent parties, subject only to the constraints of the Impairment of Contracts Clause and the need to recognize the supremacy of federal substantive law if conflict exists. *See Sturges v. Crowninshield*, 17 U.S. 122 (1819) and *In re Newport Offshore*, 219 B.R. 341 (Bankr. D.R.I., 1998). Those substantive limitations on state law are wholly separate, though, from the question of federal court *jurisdiction* over state actions in the bankruptcy context.

State could sue the State of Georgia, the decision "fell upon the country with a profound shock" as it went against the deeply held consensus of the time. 527 U.S. at 720, *quoting* 1 C. Warren, *The Supreme Court in United States History 96* (rev. ed. 1926); *accord Hans v. Louisiana*, 134 U.S. 1, 11 (1890); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 325 (1934); *Seminole Tribe*, 517 U.S. at 69. The press and the States responded with outrage. 527 U.S. at 720. It took Congress just one day to introduce a proposal to amend the Constitution to reverse *Chisholm's* result. 527 U.S. at 721, *citing* 4 *Annals of Cong.* 25, 30, 477, 499 (1794). Congress eventually passed the Eleventh Amendment with only one day's debate in each house. 527 U.S. at 721, *citing* 4 *Annals of Cong.* at 30-31, 476-78. The state ratified the Eleventh Amendment within two years time – a record of speed that appears unequaled by any other amendment since that time.

III. THIS COURT'S RECENT DECISIONS CONFIRM THAT NO ARTICLE I POWER HELD BY CONGRESS, INCLUDING THE BANKRUPTCY CLAUSE, REPRESENTS A CESSION OF A STATE'S SOVEREIGN IMMUNITY FROM SUIT IN FEDERAL COURT.

Modern decisions of this Court confirm that, although Article I of the Constitution may have granted Congress the power to pass laws regarding certain subjects, it did not abolish in any way the States' sovereign immunity from suit. Indeed, *Seminole Tribe* makes clear that the extent to which the States may have ceded their

law-making authority in certain fields to the federal government does not enhance Congress' power to abrogate sovereign immunity in the judicial arena.

The *Seminole Tribe* Court compared the Indian Commerce Clause, at issue in that case, with the Interstate Commerce Clause, at issue in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1988). The Court concluded that "[i]f anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause." 517 U.S. at 62.

Similarly, the Interstate Commerce and Indian Commerce Clauses arguably accomplish greater transfers of power from the States to the federal government than does the Bankruptcy Clause. The absence of a "dormant" bankruptcy power, similar to the "dormant" Interstate Commerce Clause, bolsters this point. *See Sturges v. Crowninshield*, 17 U.S. 122 (1819) (finding that state could pass insolvency laws in absence of any action by Congress in the field). Moreover, the requirement that the bankruptcy laws must be uniform can be viewed as a constraint on the federal legislative power that does not exist with respect to the Commerce Clause.

Seminole Tribe unequivocally overruled the assertion in *Union Gas* that the degree of cession of legislative authority to Congress conveyed a concomitant cession of judicial authority to the federal courts. 517 U.S. at 62. In so doing, the Court held that Article I powers, regardless

of the sweeping breadth of authority that they may convey to Congress, do not remove the States' sovereign immunity, and they do not give to Congress the power to abrogate it. The Court has repeated this holding in *Florida Prepaid* (the Interstate Commerce and Patent Clauses), and *College Savings Bank* (the Interstate Commerce Clause). If the States did not cede their immunity in the plan of the convention with regard to the all-encompassing Indian and Interstate Commerce powers, then, even more surely, they did not with regard to the Bankruptcy power. "[T]here is simply no principled basis to distinguish the Bankruptcy Clause from other Article I clauses for purposes of sovereign immunity. *In re Sacred Heart Hospital of Norristown*, 133 F.3d 237, 243 (3d Cir. 1998).

Likewise, the understandable need for "uniformity" in bankruptcy laws works no exception to the *Seminole Tribe* rule. In analyzing the Fourteenth Amendment power, the *Florida Prepaid* Court pointed out that one of Congress's main motivations in making States amenable to suit in federal patent court was to avoid the "patchwork of State laws . . . undermining the goal of national uniformity in our patent system." *Florida Prepaid*, 527 U.S. 644-45, *quoting* H.R. Rep. No. 101-960, pt. 1, p. 38. The Court held that "the need for uniformity in the construction of patent law is undoubtedly important, but that is a factor which belongs to the Article I patent-power calculus," rather than the availability of state sovereign immunity. *Florida Prepaid*, 527 U.S. at 645.

Similarly, the need for uniformity in the construction of bankruptcy law is undoubtedly important as well, but cannot override the sovereign immunity of the States. As with the patent law, "to place States on the same footing

as private parties" under the bankruptcy regime may be desirable as a "proper Article I concern," but it is neither a reason nor a rationale for finding that the States ceded sovereign immunity in matters of bankruptcy. 527 U.S. at 647. The courts consistently have held that the "uniformity" requirement refers solely to *geographic* uniformity – a concept not at all affected by the recognition of retained state sovereignty from suit.

CONCLUSION

For the foregoing reasons, the State of California's petition for certorari should be granted.

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